IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EMMA, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 3:11-cv-00926**
	)	**Judge Campbell**
MICROSTRATEGY INCORPORATED,	)	**Magistrate-Judge Knowles**
	)	
Defendant.	)	

DEFENDANT MICROSTRATEGY'S ANSWER, ADDITIONAL DEFENSES, AND COUNTERCLAIM

Defendant MicroStrategy Incorporated ("MicroStrategy"), by its undersigned attorneys, hereby answers the Complaint and sets forth its additional defenses and counterclaims. Unless expressly admitted, all allegations in the Complaint are denied.

1. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 1.

2. MicroStrategy admits the allegations in paragraph 2.

3. MicroStrategy admits the allegations in paragraph 3.

4. Paragraph 4 contains legal conclusions as to which no response is required. To the extent that a response is required, MicroStrategy does not contest that this Court has personal jurisdiction over it with respect to the claims asserted by Emma, Inc. ("EI") in the Complaint, but denies that it has engaged in unlawful activities that have damaged EI.

5. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 5.

6. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 6.

7. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 7.

8. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 8, but denies that EI or its brand is famous.

9. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 9, but denies that EI or its brand is famous.

10. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 10.

11. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 11.

12. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 12.

13. MicroStrategy admits that business intelligence technology is one of the services that it provides and that it became the owner of the domain name <emma.com> in the 1990s. MicroStrategy denies the remaining allegations in paragraph 13.

14. MicroStrategy admits that EI has on multiple occasions approached MicroStrategy and attempted to purchase or lease the <emma.com> domain name from MicroStrategy. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 14.

15. MicroStrategy admits that in 2011 it launched a free application called EMMA that provides buyers and sellers of merchandise and services access to Facebook credentials so that

they can know more about each other and have more confidence in such consumer-to-consumer transactions. MicroStrategy further admits that it has marketed, advertised, and promoted its EMMA product to the general public. MicroStrategy denies the remaining allegations in paragraph 15.

16. MicroStrategy admits that Exhibit 3 to the Complaint purports to be a screen capture of the website associated with <emma.com> and avers that the document speaks for itself. MicroStrategy further admits that it uses the phrase "the friendly marketplace," which sometimes appears below its EMMA mark as depicted in Exhibit 3. MicroStrategy denies the remaining allegations in paragraph 16.

17. MicroStrategy admits the allegations in paragraph 17 and further avers that MicroStrategy had no obligation, legal or otherwise, to seek EI's authorization before MicroStrategy began using its EMMA mark.

18. MicroStrategy denies the allegations in paragraph 18.

19. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 19.

20. MicroStrategy denies the allegations in paragraph 20.

21. MicroStrategy incorporates each of its previous responses as if fully set forth herein.

22. MicroStrategy denies the allegations in paragraph 22.

23. MicroStrategy denies the allegations in paragraph 23.

24. MicroStrategy denies the allegations in paragraph 24.

25. MicroStrategy denies the allegations in paragraph 25.

26. MicroStrategy incorporates each of its previous responses as if fully set forth herein.

27. MicroStrategy denies the allegations in paragraph 27.

28. MicroStrategy denies the allegations in paragraph 28.

29. MicroStrategy denies the allegations in paragraph 29.

30. MicroStrategy denies the allegations in paragraph 30.

31. MicroStrategy denies the allegations in paragraph 31.

32. MicroStrategy denies the allegations in paragraph 32.

33. MicroStrategy incorporates each of its previous responses as if fully set forth herein.

34. MicroStrategy denies the allegations in paragraph 34.

35. MicroStrategy denies the allegations in paragraph 35.

36. MicroStrategy denies the allegations in paragraph 36.

37. MicroStrategy denies the allegations in paragraph 37.

38. MicroStrategy denies the allegations in paragraph 38.

39. MicroStrategy denies the allegations in paragraph 39.

40. MicroStrategy incorporates each of its previous responses as if fully set forth herein.

41. MicroStrategy lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraph 41.

42. MicroStrategy denies the allegations in paragraph 42.

43. MicroStrategy denies the allegations in paragraph 43.

RESPONSE TO PRAYER FOR RELIEF

MicroStrategy denies that EI is entitled to the relief enumerated in paragraphs 1-4 of EI's prayer for relief or to any other relief.

ADDITIONAL DEFENSES

MicroStrategy asserts the following additional defenses and reserves the right to amend its answer and defenses and to file further pleadings, including to assert additional counterclaims.

FIRST DEFENSE

This Complaint fails to state a claim for which relief can be granted.

SECOND DEFENSE

EI is barred in whole or in part by its failure to mitigate damages.

THIRD DEFENSE

To the extent MicroStrategy could be held liable, any such liability being denied, MicroStrategy acted in good faith and innocently, and without any intent to infringe any purported rights of EI, and therefore treble and any other non-compensatory damages are not appropriate.

FOURTH DEFENSE

MicroStrategy has priority of use for its EMMA mark in association with the products and services that it offers.

COUNTERCLAIM

Defendant and Counterclaimant MicroStrategy, by and through its attorneys, hereby counterclaims as follows against EI:

JURISDICTION

1. The Court has subject matter jurisdiction under 28 U.S.C. §§ 2201 and 2202 (declaratory judgment), 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1338 (patent, trademark, copyright) in that the federal counterclaim arises under the trademark laws of the United States, 15 U.S.C. § 1051, *et seq*.

2. Venue is proper in the Middle District of Tennessee pursuant to 28 U.S.C. § 1391(c).

THE PARTIES

3. Counterclaim-Plaintiff MicroStrategy is a corporation organized and existing under the laws of Delaware with a principal place of business in Virginia.

4. Counterclaim-Defendant EI is a corporation organized and existing under the laws of Tennessee and headquartered in Nashville.

FACTS ENTITLING MICROSTRATEGY TO RELIEF

5. MicroStrategy creates and provides software products to assist users to organize, analyze, and monitor data.

6. MicroStrategy delivers and services its software products via web and mobile devices.

7. On or around July 24, 2011, MicroStrategy launched EMMA, a free computer application that provides buyers and sellers of merchandise and services access to Facebook credentials so that they can know more about each other and have more confidence in such consumer-to-consumer transactions (the "EMMA Application").

8. MicroStrategy's use of the EMMA mark is limited to use in connection with the EMMA Application and related provider services and software products. MicroStrategy is the owner of the EMMA mark for these uses, and no other person, firm, corporation, or association may use the EMMA mark in commerce for the same products or services.

9. EI, by contrast, provides business-to-business email marketing and advertising services to its commercial customers.

10. EI is the purported owner of U.S. Trademark Reg. No. 2,758,869 for the mark "emma" for "disseminating advertising for others via the Internet" in International Class 35.

11. On information and belief, EI does not offer—and has never offered—consumer-to-consumer application services and related software products similar to those offered by MicroStrategy.

12. An actual controversy and adversarial conflict exists between MicroStrategy and EI in regard to MicroStrategy's use of the EMMA mark in connection with computer software and related provider services.

DECLARATORY JUDGMENT THAT THE PARTIES MAY CONTINUE TO CO-EXIST

13. MicroStrategy repeats and realleges the allegations set forth in paragraphs 1-12 above.

14. EI does not have exclusive rights in the "emma" mark for all goods and services or even as to all computer software products and services.

15. There are at least nine federally registered EMMA marks for use in connection with computer software products and services, including the following:

Mark	Reg. No.	Goods and Services	Registrant
EMMA E-MAIL MESSAGE ASSISTANT	3707289	(INT. CL. 9) computer program to automatically send out e-mail messages	AMERICAN TELEPHONY, INC. 13 CAMBRIDGE ROAD DOWNINGTOWN, PENNSYLVANIA 19335
EMMA	3073128	(INT. CL. 42) providing temporary use of on-line non-downloadable software for use in employee placement	CREATIVE ON CALL, INC. SUITE 1101 200 SOUTH HANLEY CLAYTON, MISSOURI 63105
EMMA	1601950	(INT. CL. 9) computer programs for the management of medical offices, and accompanying operations manuals sold as a unit	ESSAK, ZAFAR M., DR. P.O. BOX 46263, STATION G VANCOUVER, BRITISH COLUMBIA V6R 4G6
EMMA	3472844; 3581378	(INT. CL. 9) computer software for the use and operation of automated pharmaceutical dispensing systems; pharmaceutical dispensing system with real-time inventory control and management, namely, automatic dispensing machines consisting of machine hardware, computer hardware and computer	INRANGE SYSTEMS, INC. 115 UNION AVENUE ALTOONA, PENNSYLVANIA 16602

Mark	Reg. No.	Goods and Services	Registrant
		software	
EMMA	3012878	(INT. CL. 42) computer services, namely, providing temporary use of online non-downloadable id and passwords protected computer software for automating information management, namely managing equipment maintenance, parts replacement, and labor costs, scheduling work orders, daily, weekly, monthly, quarterly, or annually, tracking fuel costs and usage, determining the actual cost to operate each piece of equipment; identifying problem areas to establish a pro-active maintenance routine, for companies who routinely engage in maintenance of equipment	NCH CORPORATION 2727 CHEMSEARCH BLVD. IRVING, TEXAS 75062

Mark	Reg. No.	Goods and Services	Registrant
EMMA EMMA MOBILE	3357357 3835644	(INT. CL. 9) semiconductors, optical semiconductors, microwave semiconductors, compound semiconductors, diodes, transistors, gallium arsenide field-effect transistors, standard cells, integrated circuits, integrated circuit packages, application integrated specific circuits, hybrid integrated circuits, large scale integrated circuits, gate arrays, computer memories, microcomputers, read only memories, random access memories, static random access memories, dynamic random access memories, programmable read only memories, erasable programmable read only memories, electrically erasable programmable read only memories, field programmable read only memories, microcomputers, central processing units, microprocessors, charge-coupled devices, printed wiring boards, capacitors, variable resistors, keyboards, electrical connectors, computer software for use in designing integrated circuits, relays, electroluminescent lighting panels, liquid crystal displays, light emitting diode displays, computer connecting boards and connectors for conjunction with computer peripherals; none using or incorporating expanded memory manager software	RENESAS ELECTRONICS KABUSHIKI KAISHA (RENESAS ELECTRONICS CORPORATION) 1753, SHIMONUMABE, NAKAHARA-KU KAWASAKI, KANAGAWA 0 JAPAN

Mark	Reg. No.	Goods and Services	Registrant
EMMA	2860949	(INT. CL. 42) providing temporary use of an online nondownloadable suite of interactive software applications in the field of medical education for pharmaceutical and healthcare companies	Y&R PROPERTIES 1001 FRONT STREET SAN FRANCISCO, CALIFORNIA 94111

16. The goods and services provided by American Telephony are particularly significant because the scope of those goods and services is broad—"computer program to automatically send out e-mail messages"—and thus identical or similar to the goods and services allegedly provided by EI under its "emma" mark. If EI's "emma" mark can co-exist with American Telephony's "emma" mark for identical or similar goods and services, EI can co-exist with MicroStrategy's EMMA mark for distinctive products and services.

17. On information and belief, there are also numerous third party common law uses of the EMMA mark in connection with computer software products and services.

18. On information and belief, owners of the above third party marks have successfully co-existed for at least 20 years because, among other things, their products and services are not overlapping and meaningful differences exist in the consumers and markets for such goods.

19. Because of the many existing registrations and uses of "EMMA" marks by third parties in connection with computer software products and services, EI's "emma" mark is weak and entitled only to narrow protection.

20. EI cannot assert exclusivity in the "emma" mark in connection with Apple Store software applications or other applications for smartphones or in connection with social networking.

21. Accordingly, MicroStrategy seeks declarations (i) that MicroStrategy's EMMA Application and its EMMA mark for use in connection with social media consumer-to-consumer

applications and related software products does not infringe upon or otherwise violate rights of EI (under 15 U.S.C. § 1114, 1125(a), 1125(c) or other applicable law) and (ii) that MicroStrategy and EI may continue to co-exist in the provision of their respective products and services.

PRAYER FOR RELIEF

WHEREFORE, MicroStrategy respectfully requests that the Court grant the following relief:

1. Dismiss EI's Complaint with prejudice.

2. Enter a declaratory judgment that MicroStrategy's EMMA Application and EMMA mark for use in connection with social media consumer-to-consumer applications and related software products does not infringe or otherwise violate the rights of EI and that MicroStrategy and EI may continue to co-exist in the provision of their respective products and services.

3. Award MicroStrategy its attorneys' fees, costs, and disbursements to the fullest extent allowed under the law.

4. Award such additional relief as the Court deems just and proper.

November 8, 2011

s/ Robb S. Harvey
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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2011, a true and correct copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties and the public may access this filing through the Court's electronic filing system.

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